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Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of:	
Motorola Satellite Communications Inc.	ET Docket No. 92-28 PP-32
Request for Pioneer's Preference to Establish a Low-Earth Orbit Satellite System in the 1610-1626.5 MHz Band.	
In the matters of:	
Ellipsat Corp.; TRW, Inc.; Constellation Communications, Inc.	FOIA Control Nos. 92-83, 92-88, 92-86
On Request for Inspection of Records.	

To: The Commission
General Counsel

OPPOSITION TO APPLICATION FOR REVIEW OF PROTECTIVE ORDER

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In its Application for Review of the Protective Order covering Motorola's confidential appendix, AMSC makes three points. First, AMSC claims that the conditional access to Motorola's Confidential Appendix makes it virtually impossible for AMSC to review the material without conceding a future trade secret misappropriation action to Motorola. Second, AMSC maintains that the Office of Engineering and Technology failed to make adequate findings on the record to support the issuance of a Protective Order. Finally, AMSC argues that permitting confidential treatment of supporting data in any pioneer's preference proceeding would be so burdensome as to require the virtual elimination of the Commission's rules protecting trade secrets and confidential commercial information for pioneer's preference applicants.

While Motorola finds AMSC's sensitivity to potential trade secret litigation laudable, AMSC's assertion that good faith compliance with the Protective Order here would be tantamount to losing a future law suit strains credulity. Four other participants in this proceeding have reviewed the protected materials, apparently undeterred by the specter raised by AMSC. Similarly, AMSC's assertion that confidential treatment of trade secrets in pioneer's preference proceedings is never appropriate must be taken as rhetorical hyperbole. The Protective Order at issue here correctly balances the proprietary interests

traditionally protected by the Freedom of Information Act trade secrets exemption with the interests of fairness and peer review essential to an equitable and effective pioneer's preference proceeding.

As to AMSC's remaining assertion, it is clear from OET's letter and the Protective Order itself and from the very context of this proceeding that the protected materials meet the tests for confidential proprietary information established by case law. To the extent that the Protective Order and the OET letter may not adequately describe the competition reflected in this highly contested pioneer's preference proceeding or the potential competitive harm that Motorola would suffer if its confidential material were made public, the Commission may want to elaborate on the Chief Engineer's rationale in its denial of this Application for Review.

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OPPOSITION TO APPLICATION FOR REVIEW OF PROTECTIVE ORDER

Motorola Satellite Communications, Inc. ("Motorola") hereby files its Opposition to the Application for Review submitted by AMSC Subsidiary Corporation ("AMSC") in the above-captioned proceedings.[1/] AMSC asks the Commission to review the

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[1/] AMSC lacks standing to request review of OET's determination as to the FOIA requests filed by TRW, Inc., Constellation Communications, Inc. and Ellipsat Corporation. In accordance with the Commission's Rules, only the persons who submitted the records and the persons who filed requests for inspection of such records may file an application for review of a decision to partially grant or deny such requests. See 47 C.F.R. § 0.461(h)(2) (1991). AMSC neither submitted the materials under consideration nor filed a FOIA request to have Motorola's confidential information released for inspection.

decision of the Office of Engineering and Technology ("OET") to issue a Protective Order covering the redacted Confidential Appendix submitted by Motorola in support of its pioneer's preference request in these proceedings.[2/] AMSC asserts that this Protective Order effectively has denied it access to Motorola's confidential materials. It also challenges the adequacy of the Commission's findings that the materials submitted by Motorola qualify for the trade secret exemption to the Freedom of Information Act ("FOIA"). And finally, AMSC suggests that the Commission should not permit pioneer's preference applicants to rely on materials subject to a protective order, even when competing applicants are permitted to review such protected materials.

AMSC's appeal is specious and a transparent attempt to delay further these proceedings and to prevent Motorola from receiving a preference for the obvious innovations and new technologies associated with the IRIDIUM™ system. AMSC's arguments are without substance and its Application for Review must therefore be denied.

[2/] Protective Order, DA 92-674, FOIA Control Nos. 92-83, 92-88, 92-86 (May 28, 1992).

I. The Protective Order

On April 10, 1992, Motorola submitted a Supplement to its pending request for a pioneer's preference for the technological and service innovations associated with its IRIDIUM™ system.[3/] This Supplement included a 15-page brief and two appendices. One of these appendices contained Motorola confidential proprietary information and was filed in a sealed envelope with the Commission only, with a letter request for confidential treatment. Motorola's letter request stated:

> [The sealed envelope] includes highly confidential, sensitive and company proprietary information concerning Motorola's IRIDIUM™ system. In particular, Motorola is submitting information concerning pending patent applications, preliminary results of experiments and field tests, a videotape of a voice simulation using the IRIDIUM™ system, and a computer diskette containing copyrighted software which simulates operation of intersatellite links.[4/]

[3/] Motorola filed its application to construct, launch an operate the IRIDIUM™ system on December 3, 1990. See Application of Motorola Satellite Communications, Inc. for IRIDIUM™ -- A Low Earth Orbit Mobile Satellite System, File Nos. 9-DSS-P-91 (87) & CSS-91-010 (December 3, 1990). Additional supporting information was filed in a supplement in February 1991. See Supplemental Information to IRIDIUM™ System Application, File Nos. 9-DSS-P-91(87) & CSS-91-010 (February 22, 1991). In conjunction with its application for IRIDIUM™, Motorola also submitted a request for a pioneer's preference. Following the adoption of the Commission's pioneer's preference rules, Motorola's request for a pioneer's preference was renewed by a separate filing on July 30, 1991. See Request for Pioneer's Preference, Motorola Satellite Communications Inc. (July 30, 1991).

[4/] See Letter to Donna R. Searcy from Philip L. Malet (April 10, 1992).

The Chief Engineer delegated responsibility for reviewing Motorola's confidential materials to the Chief of the Frequency Allocation Branch. On May 4, 1992, following an in camera review of the confidential appendix, OET granted in part and denied in part the FOIA requests of TRW, Inc. ("TRW"), Loral Qualcomm Satellite Services, Inc. ("LQSS"), and Ellipsat Corporation ("Ellipsat") to release the confidential information ("OET Letter").[5/] The OET Letter identified the materials in Motorola's Confidential Appendix as:

1. A printed "Confidential Appendix" containing, at tab A, documents concerning patent applications, and at tab B, documents concerning preliminary results of experiments and field tests;

2. A computer diskette containing software that Motorola described as simulating operation of inter-satellite links; and

3. A videotape of a voice simulation.

With one exception (a Chinese patent application), OET found the materials submitted by Motorola were exempt from disclosure under FOIA. Motorola was requested by OET to chose between several options made available to it concerning the possible use of its confidential materials in this pioneer's preference proceeding, including limited disclosure and the issuance of a protective order.

The contents of the Confidential Appendix were described in more elaborate detail in Motorola's May 11, 1992

[5/] Letters from David R. Siddall, CN92-83, CN92-86 & CN92-88 (May 4, 1992).

letter to OET.[6/] ("Motorola Reply Letter.") In that letter, Motorola agreed to release the information contained in the Confidential Appendix subject to minor redactions and the issuance of a suitable protective order.

On May 28, 1992, OET issued the subject Protective Order.[7/] The Protective Order refers to the description of Motorola's Confidential Appendix, as redacted and as set forth in the OET Letter, as "Confidential Information," restricts disclosure of that information to Commission personnel, counsel and other specified persons who represent parties to the pioneer's preference proceeding, and restricts the use of the confidential information to this proceeding. The Protective Order further contains provisions for safeguarding and labelling the confidential information and a non-waiver provision which limits the ability of parties inspecting the confidential

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[6/] See Letter to David Siddall from Philip L. Malet (May 11, 1992).

[7/] The order was issued pursuant to Section 0.241 of the Commission's Rules, 47 C.F.R. § 0.241, which delegates to the Chief Engineer the performance of the duties and responsibilities listed in Section 0.31 of the Commission's Rules, including:

> (g) To render, in cooperation with the General Counsel and the Office of Plans and Policy, advice to the Commission, participate in and coordinate staff work with respect to general frequency allocation proceedings and other proceedings not within the jurisdiction of any single bureau, and render service and advice with respect to rule making matters and proceedings affecting more than one Bureau; and
>
> (h) To collaborate with and advise other Bureaus and Offices in the formulation of technical requirements of the Rules.

materials to assert elsewhere that Motorola has waived confidentiality by disclosures it may make in this proceeding.

Four of the other parties (Ellipsat, Constellation, LQSS and TRW) availed themselves of the opportunity to review the materials subject to the Protective Order and filed reply comments on the confidential materials. AMSC, however, elected not to review the confidential materials and instead, filed the subject application for review and related motion to stay.

II. AMSC Has Not Been Denied Access to Motorola's Confidential Materials by the Protective Order

AMSC asserts in its application for review that it has been effectively denied access to the materials subject to the Protective Order, because it fears Motorola might sue it for trade secret violations if it is determined later that AMSC misappropriated Motorola's confidential and proprietary information. Such an assertion, based upon a series of hypotheticals, is merely a strawman argument for which the Commission should not give any credence.

AMSC first recites the elements necessary to establish a claim of misappropriation of trade secrets, then notes that the definitions of "trade secret" under the Restatement of Torts and the Uniform Trade Secrets Act are broad.[8/] AMSC alleges that because it is developing technologies potentially similar to that which might be disclosed in Motorola's confidential information,

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[8/] Application for Review at pages 10-11.

it might prove difficult to meet the high burden of proof required of defendants in trade secret actions to show they independently developed similar products. It further asserts that its own good faith compliance with the Protective Order could be used as evidence that Motorola's materials did in fact contain trade secrets.

Although it may be giving AMSC's arguments more credence than they deserve, Motorola makes the following points. First, the terms of the Protective Order provide that the Order's restrictions on the use of the information "shall not preclude the use of any material or information in the public domain or which has been developed independently by any other person." Protective Order, ¶ 5. AMSC participated in the insertion of this provision in the Protective Order, and should not now be allowed to deny its existence.

Second, if AMSC truly was concerned about proving that it may have developed its own technology, it could have hired an outside technical consultant to review the materials and assist its counsel in preparing timely reply comments. The Protective Order specifically allows for outside experts to review the confidential materials. Protective Order at ¶ 4. Motorola should not be penalized for AMSC's apparent lack of confidence in being able to comply with the terms of the Protective Order.

Third, it is hard to see how AMSC is situated any differently in this proceeding from Ellipsat, TRW, Constellation, or LQSS. Each of these companies has availed itself of the conditional access provided by the Protective Order and provided

extensive comments to the Commission, without apparent harm or serious trepidation.

Lastly, AMSC's argument that "at least some of the information submitted by [Motorola] would qualify as trade secrets,"[9/] is inconsistent with AMSC's other arguments concerning the Commission's alleged lack of adequate explanation as to why Motorola's materials qualify as trade secrets under FOIA.

III. Motorola's Confidential Information Clearly Satisfies the Definition of Materials that are "Trade Secrets and Commercial or Financial Information and Privileged or Confidential" Under FOIA

A. AMSC's Assertion That A Lengthy Record and Public Input Are Required on All Confidentiality Requests is Incorrect

AMSC next asserts that OET's confidentiality determination should have included "a series of explicit and reasoned findings, based on a complete record and public comment" supporting confidential treatment. AMSC argues that the OET Letter lacks adequate findings, based upon a complete record and public comment.

While there is no exact prescription for the detail required in determinations of whether a FOIA exemption applies under the Commission's rules, the basic requirements are that an agency ruling must be within the agency's power, must be based upon substantial evidence, and must be sufficiently clear and

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9/ Application for Review at 11.

complete so a reviewing court need not guess as to its rationale. Dunkley Refrigerated Transport, Inc. v. U.S., 416 F. Supp. 814, 819 (1976). The court in Dunkley, a case cited by AMSC, referred to Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86 (1974), where the Supreme Court stated:

> While we may not supply a reasoned basis for the agency's action that the agency itself has not given, . . . we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.

416 F. Supp. at 819.

The level of factual analysis required to reach a reasoned determination of simple questions will clearly not be as great as that required in reaching complicated issues. The Commission in this instance was faced with a simple question: in the context of a highly contested pioneer's preference proceeding involving potential competitors, do materials described as "patent applications, preliminary results of experiments and field tests, computer software simulating operation of inter-satellite links" constitute trade secrets or commercial information which are confidential?

The Commission's delegated representative reviewed Motorola's materials in camera and determined that many of them did, in fact, were protected from disclosure. The OET Letter specifically refers to Section 0.457(d) of the Commission's rules,[10/] and Exemption 4 of the Freedom of Information Act, in

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[10/] 47 C.F.R. § 0.457 Records not routinely available for public inspection. (d) Trade secrets and commercial or financial

(continued...)

reference to the materials found to be so protected. For materials found not to be covered -- information contained at tab A-7 -- OET explained that the material appeared to be in the public domain and was therefore not confidential.

It is true that the OET Letter does not state the obvious, i.e. that the entire pioneer's preference proceeding is contested, that several competitors of Motorola have an interest in reviewing the materials, and that there are substantial investment gains and losses at stake. Six companies are vying for an allocation of limited radio spectrum, where any scientific or technological insight into a competitor's approaches could have significant adverse economic consequences. This competitive reality is an integral part of the context in which the Protective Order was entered and obviously informed the Commission's determination.

As noted above, it is so obvious to AMSC that Motorola's Confidential Appendix contained trade secrets, that AMSC has refused to review the materials for fear of losing a trade secret infringement action. This reasonably simple question clearly does not require elaborate public input and a

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10/ (...continued)
information obtained from any person and privileged or confidential, 5 U.S.C. 552(b) and 18 U.S.C. 1905. Section 552(b)(4) is specifically applicable to trade secrets and commercial or financial information but is not limited to such matters. Under this provision, the Commission is authorized to withhold from public inspection materials which would be privileged as a matter of law if retained by the person who submitted them, and materials which would not customarily be released to the public by that person, whether or not such materials are protected from disclosure by a privilege. See, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, June 1967, at pages 32-34.

lengthy record to decide. AMSC's enthusiasm for applying the lengthy and highly complex analysis of Switching Cost Information Systems applied in the "ONA I" and "ONA II" proceedings to the issues presented in this case is clearly inappropriate.

B. Under Current Commission Rulings and Case Law Standards Motorola's Submissions Qualify for Confidential Treatment

While Motorola believes that in the context of this proceeding the OET Letter presents a clear rationale for according confidential treatment to Motorola's Confidential Appendix, the Commission may chose to articulate its rationale at greater length. First, Motorola's Confidential Appendix contains (i) commercial information; (ii) obtained by the Commission from Motorola (i.e. not a government entity); (iii) and is confidential. Board of Trade v. Commodity Futures Trading Commission, 627 F.2d. 392, 401 (D.C. Cir. 1980), In the Matter of Robert J. Butler On Request for Inspection of Records, 6 FCC Rcd. 5414, 5415.

Second, the "privileged or confidential" test is met when disclosure is likely to: (i) impair the Government's ability to obtain the necessary information in the future (the "impairment prong"); (ii) cause substantial harm to the competitive position of the person from whom the information was obtained (the "competitive harm prong"); or (iii) adversely affect the effectiveness of the Government's programs (the "program effectiveness prong"). Robert J. Butler, 6 FCC Rcd at 5415, citing National Parks & Conservation Ass'n v. Morton, 498

F.2d 765 (D.C. Cir. 1974); Critical Mass Energy Project v. Nuclear Regulatory Commission, 931 F.2d 939, 943 (D.C. Cir. 1991); 9 to 5 Org. for Women Office Workers v. Board of Governors of the Federal Reserve System, 721 F.2d 1, 10 (1st Cir. 1983).

According confidential status to Motorola's confidential information is clearly justified under both the competitive harm prong and the program effectiveness prong. The competitive harm prong requires a showing that actual competition exists and substantial competitive injury would likely result from disclosure. Robert J. Butler, 6 FCC Rcd. 5414, 5416, citing National Parks and Conservation Association v. Kleppe, 547 F.2d 673, 679 (D.C. Cir. 1976). As previously indicated, the very context of the pioneer's preference proceeding shows that actual competition exists. Moreover, Motorola's IRIDIUM™ System technology represents an investment of millions of dollars and years of research. To provide details of Motorola's system design to its competitors who are seeking to defeat Motorola's pioneer's preference request and its application for a license to operate the system, and who may have an opportunity to modify their own systems in the future to incorporate technological improvements, would demonstrably cause Motorola substantial competitive harm.

In addition, the program effectiveness prong is equally satisfied. For the pioneer's preference process to achieve its stated purpose -- to encourage development of new and creative technologies -- the Commission must assure potential applicants that they can apply for a preference without turning over

unilaterally and without protection their trade secrets and technological breakthroughs to competitors. Confidential treatment for some sensitive information as determined by the Commission, such as has been done for Motorola's Confidential Appendix, is not only appropriate, but essential for the pioneer's preference program to work effectively.[11/]

IV. AMSC's Assertion That The Commission Should Either Provide Unconditional Access to All Records Submitted in Pioneer's Preference Proceedings or Exclude Confidential Materials From Consideration Would Undermine the Goals of the Pioneer's Preference Program.

AMSC lastly argues a parade of horribles culminating in the conclusion that neither Motorola nor any other applicant for a pioneer's preference should be accorded confidential treatment

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11/ The Commission can also draw on a number of its FOIA decisions which did not involve the elaborate procedures desired by AMSC. See In the Matter of Martha H. Platt, 5 FCC Rcd. 5742 (Oct. 3, 1990) (audit reports sought by plaintiff held confidential under program effectiveness prong of Exemption 4 of FOIA); In the Matter of Robert J. Butler, 6 FCC Rcd. 5414 (Sept. 17, 1991) (documents of negotiations between AMSC, U.S. and Soviet Union officials held confidential under program effectiveness prong and competitive harm prong of Exemption 4); Policies and Rules Concerning Operator Service Providers, 6 FCC Rcd. 5058 (Aug. 16, 1991) (cost data submitted to Commission by operator service providers held confidential under competitive harm prong of Exemption 4); In the Matter of J. David Stoner, 5 FCC Rcd. 6458 (Oct. 19, 1990) (material concerning procurement practices of telephone carriers held confidential under both impairment prong and program effectiveness prong of Exemption 4); In the Matter of Scott J. Rafferty, 5 FCC Rcd. 4138 (July 11, 1990) (raw financial data held confidential under program effectiveness prong because disclosure of the data likely to significantly diminish the cooperation of carriers); Allnet Communications Services Inc., 5 FCC Rcd. 4878 (July 27, 1990) (portions of audit reports pertaining to auditor's fees held confidential under competitive harm prong of Exemption 4).

of proprietary trade secret or commercial information. The option offered to potential applicants is to either make trade secret information public or to withhold the technological innovations from Commission consideration which are more than likely essential to an award of such a preference.

AMSC warns that the Commission's decision in favor of confidential treatment in this case will have far-reaching consequences. It complains that "routine grant of protective orders ... would hide from public and peer scrutiny critical evidence on [technical feasibility]."[12/] Enforcement of orders would be excessively time consuming and present virtually insurmountable problems, AMSC asserts. Finally, AMSC concludes: "So substantial a burden on the Commission's processes outweighs the marginal benefit to be obtained by the consideration of additional evidence in support of requests for Pioneer's Preferences."[13/]

AMSC's position on this issue is backward. First, as stated above, the very purpose of encouraging technological innovation central to the pioneer's preference process depends on the ability of potential applicants to protect their most advanced and valuable trade secrets and confidential plans. In the vast majority of cases, such as this one, the "burden" imposed by providing confidential treatment is not "substantial" at all. And, rather than providing "marginal benefit," confidential treatment of such materials will give access to the

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12/ Application at 20.

13/ Id. at 21.

Commission and, in this case, to other applicants. While a good case for allowing the public unlimited access to cost and rate making data in tariff proceedings might be made, such access to all information submitted by pioneer's preference applicants serves no demonstrable purpose, and would, undermine the effectiveness of the pioneer's preference rules.

V. CONCLUSION

For the foregoing reasons, the Commission must deny AMSC's Application for Review, while reaffirming its rationale for according Motorola's material confidential treatment.

Respectfully submitted,

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I, Philip L. Malet, hereby certify that the foregoing Opposition to Application for Review was served by first-class mail, postage prepaid, this 26th day of June, 1992 on the following persons:

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